UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 18

Respondent; and

NERONE & SONS, INC. 08-CD-135243
R.G. SMITH COMPANY, INC.
KMU TRUCKING & EXCAVATING
SCHIRMER CONSTRUCTION CO.
PLATFORM CEMENT
21st CENTURY CONCRETE CONSTRUCTION, INC.
INDEPENDENCE EXCAVATING, INC.

Charging Parties; and

LABORERS' INTERNATIONAL UNION OF NORTH
AMERICA, LOCAL 310

Party-In-Interest.

RESPONDENT'S REPLY BRIEF TO THE CHARGING PARTIES' ANSWERING BRIEF

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent International Union of Operating Engineers, Local 18 hereby submits its Reply Brief to the Charging Parties' Answering Brief in the present matter.

Respectfully Submitted,

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REPLY BRIEF

While the Charging Parties would have it otherwise, the International Union of Operating Engineers, Local 18 ("Local 18") does not seek to render the Act's statutory regime under Sections 10(k) and 8(b)(4)(D) a nullity by contorting the affirmative defense of work preservation beyond its breaking point. The notion of "work preservation" is self-explanatory, and Local 18 is not attempting to formulate a "new concept" of the same (CP Ans. Br., p. 2, fn. 2), but instead utilize well-worn principles of Board jurisprudence as it pertains to clarifying the parameters of that affirmative defense.

In order to identify the work to be preserved, the scope of the unit allegedly performing that work must first be established. As Local 18 has explained at length in its Brief in Support of Exceptions, where the bargaining unit to which the Charging Parties belong is multiemployer in scope, the Board must look to the unit as a whole to determine whether the work in dispute – here, forklift and skid-steer work – is fairly claimable by Local 18 members. The Charging Parties do not specifically attack or address this particular argument, but only contend that somehow this prejudices the work preservation efforts of the Laborers themselves. (*See* CP Ans. Br., p. 2, fn. 2.) Even if they had made such an argument, which they have not, any work preservation position they may have does not negate that of Local 18. In fact, such a dispute "does not lose its character as a work preservation dispute simply because more than one union may have a work preservation claim to the same work." *E.g., Machinists District 190 (SSA Terminal, LLC)*, 344 NLRB 1018, 1020 (2005), *enfd.*, 253 Fed.Appx. 625 (9th Cir. 2007). Accordingly, any "claim" by the Laborers that they are attempting to preserve work is irrelevant for purposes of determining the validity of the same argument by Local 18.

Moreover, work preservation as an exception to the legal finding of a jurisdictional dispute is a well-established aspect of Board law. The Board has long recognized that the "attempt to enforce . . . *contractual* work preservation provisions . . . does not present a jurisdictional dispute within the meaning of Section 10(k) of the Act." *E.g., Teamsters Local 578 (USCP-WESCO, Inc.),* 280 NLRB 818, 820 (1986), *enfd.*, 827 F.2d 581 (9th Cir. 1987). (Emphasis added.) The Board's justification for so holding is based on two fundamental policies: the maintenance of "industrial peace" and the refusal to assert jurisdiction in a manner which would otherwise "ensure[] that the legitimate work preservation provisions would become unenforceable." *Id*. at 821. Local 18's work preservation efforts in the instant matter constitute grievances which could conceivably be taken to arbitration. Such efforts to maintain what Local 18 has duly bargained for is consonant with the purposes of the Act, as it "prefers arbitration as the desirable method of settlement of disputes over the application or interrelation of collective bargaining agreements" when a union pursues a work preservation objective. *USCP-WESCO, Inc. v. NLRB,* 827 F.2d 581, 586 (9th Cir. 1987). Not every dispute between "two . . . employee groups is per se a jurisdictional dispute under Section 8(b)(4)(D)." *Waterway Terminals Co. v. NLRB,* 467 F.2d 1011, 1021 (9th Cir. 1972). Such a contrary approach "would wreak havoc with the statutory scheme for resolving" labor disputes in general. *Id*. Local 18 does not seek to "reject[] application" of the Board's statutory scheme in favor of arbitration (CP Ans. Br., p. 2, fn. 3), but instead applies the universally accepted exception of work preservation as an affirmative defense to a jurisdictional dispute where the ALJ found that Local 18 violated Section 8(b)(4)(D) of the Act. That is, Local 18 seeks to avoid liability by "establishing . . . an affirmative defense" notwithstanding any elements of the General Counsel's *prima facie* case. *OHI America, Inc.*, 313 NLRB 447, 447 (1993). Work preservation as such a defense is

appropriate because, if established, demonstrates that Local 18's "object was to preserve work," and such conduct thus does "not amount to a violation of Section 8(b)(4)(D). *Glaziers Local 513 (Custom Contracting Co.)*, 292 NLRB 792, 793 (1989).

Accordingly, Local 18 must, and has, asserted by a preponderance of the evidence, that within the applicable multiemployer bargaining unit, forklift and skid-steer work is fairly claimable by Local 18 members. No fewer than 51 different building construction employers were bound to the CEA Agreement set to expire in 2015 (*Donley's IV*: L18 Ex. 171 A-C); no fewer than 89 different building construction employers were bound to the CEA Agreement that expired in 2012 (*Donley's IV*: L18 Ex. 171D-F); and no fewer than 30 different building construction employers were bound to the CEA Agreement that expired in 2009 (*Donley's IV*: L18 Ex. 171G-H.) Within the scope of the CEA's multiemployer bargaining unit, a preponderance of the evidence establishes that forklift and skid-steer work is fairly claimable by Local 18 members. Hundreds of contractors within the unit have historically assigned forklifts and skid-steers to operating engineers. (*Donley's IV*: L18 Ex. 177; L18 PHB, Attachment A.) Indeed, hundreds upon hundreds of work orders by these contractors make clear that they have traditionally and repeatedly requested that Local 18 refer operating engineers to run forklifts and/or skid-steers. (*Donley's IV*: L18 Ex. 180-186; L18 PHB, Attachment C.) Moreover, dozens of Local 18 members testified as to their own personal experiences operating forklifts and skid-steers for building construction employers that were bound to the AGC Agreement and/or the CEA Agreement. In each instance, the witness offered credible and reliable testimony as to the name of their employer, the type of work performed, the location of the jobsite, and their understanding of which CBA governed their employment. (*Donley's IV*: Tr. 601-611, 818-30,

846-62, 917-30, 933-54, 990-1000, 1467-86, 1515-20, 1527-32, 1572-82, 1603-07, 1622-36, 1639-59, 1669-73, 1695-1707, 1729-1738; L18 PHB, Attachment B.)

As such, the ALJ's finding as to the extent of Local 18-represented employees performing forklift and skid-steer work for the specific Charging Parties is of no moment. Nonetheless, the ALJ's finding that this amounted nothing more to "isolated instances" (CP Ans. Br., p. 2, fn. 1) is simply wrong. Specifically, Local 18 members Jennifer Miller, Richard Pavelecky, Everee Springer, and Phillip Latessa all credibly testified that they had – for long periods of time and on many multiple occasions – performed forklift and/or skid-steer work for R.G. Smith and Independence. (*Donley's IV*: Tr. 776-96, 867-914, 959-67, 1020-35.) Ms. Miller had worked for R.G. Smith operating such equipment throughout 2013, Mr. Pavelecky had worked for Independence operating such equipment from 2010 through 2014, Ms. Springer had worked for Independence operating such equipment throughout 2014, and Mr. Latessa had worked for Independence for decades. (*Id*.) Similarly, Charging Parties KMU and 21st Century themselves *admitted* that they had consistently utilized operating engineers to operate forklifts and skid-steers. (*Donley's III*: Tr. TR 245-246, 264-265, 291.) At bottom, all of the foregoing evidence sufficiently establishes that forklift and skid-steer work within the multiemployer bargaining unit is fairly claimable by Local 18.

Finally, the failure of the General Counsel to contemporaneously allege a violation of Section 8(e) of the Act along with its 8(b)(4)(D) allegations against Local 18 does in fact render the present conflict non-jurisdictional, contrary to the Charging Parties' contentions. (CP Ans. Br., p. 3.) Indeed, the Board has suggested that a finding of a Section 8(b)(4)(D) violation necessarily contemplates a Section 8(e) violation, the latter's construction industry proviso notwithstanding. *Operating Engineers Local 825*, 140 NLRB 458, 460 (1963), fn. 3. That is,

where a union attempts to enforce a contract that does "more than define and reserve for the exclusive performance of employees in a bargaining unit work of a kind that has been traditionally performed in that unit," such conduct is violative of both Sections 8(b)(4)(D) and 8(e). *Ohio Valley Carpenters Dist. Council*, 136 NLRB 977, 985-86 (1962). *See also Teamsters Local 216*, 198 NLRB 1046, 1048 (1972). On the other hand, the General Counsel has acknowledged that where a union's work preservation grievance seeks to protect fairly claimable work within the appropriate bargaining unit, the union's conduct violates neither Sections 8(b)(4)(D) nor 8(e). *ILA Local 1291 (Holt Cargo) Advice Memo*, No. 4-CC-2124-1, 1996 NLRB GCM LEXIS 25, *13-16 (Aug. 27, 1996). The same work preservation analyses and justifications animate both 8(e) and 8(b)(4)(D) allegations, and the General Counsel's failure to invoke the former statute demonstrates that the latter statute is utterly inapplicable to the instant dispute.

For all the foregoing reasons, the Charging Parties' Answering Brief lacks merit and Local 18 respectfully requests that the Board overrule the ALJ's Decision in its entirety.

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CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed with the National Labor Relations Board, Office of the Executive Secretary, and served via email to the following on this 4th day of October, 2016:

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